non-discriminatory basis, system operators will not in any way, shape, or form be offering capacity "indiscriminately" to the public. The provision of space segment capacity to mobile service providers, therefore, will not satisfy an essential criterion of the definition of a commercial mobile service.

2. When An MSS/RDSS System Makes Space Segment Capacity Available To Service Providers, It Is Not Providing An "Interconnected Service."

The provision of space segment capacity to mobile service providers also does not constitute commercial mobile service because it is not "interconnected service." "Interconnected service" is defined in the Act as service that is "interconnected with the public switched network" or "service for which a request for interconnection is pending . . . ."[41/]

41/ 47 U.S.C. § 332(d)(2). At the outset, TRW notes that the Commission has been tasked by Congress to define the terms "interconnected" and "public switched network." Notice, FCC 93-454, slip op. at 5. The Commission's use of the term "public switched telephone network" to refer to the local and interexchange common carrier switched network, whether by wire or radio (see id. at 8 & n.26 (citations omitted)), is workable, and there is no reason for it to depart from that standard at this time. As for the term "interconnected service," TRW urges the Commission to interpret the phrase to refer to those communications systems that are not only physically interconnected with the public switched network, but that also make interconnected service available at the end user level. Id. at 5. Thus, as the Commission suggests, "a service that does not allow the subscriber directly to access the network may not be 'interconnected service' even though the service provider may otherwise use the facilities of the public switched network." Id.

When a satellite licensee makes space segment capacity available it is not providing a service; it is merely making available facilities that the service providers may themselves use to provide a service. This approach to the definition of interconnected service -- i.e., the notion that end users must be able to access the PSN before a mobile service will be deemed to be an interconnected mobile service -- is consistent with the Commission's tentative determination that mobile satellite services will be non-common carrier services unless they are provided directly to end users.[42/]

E. The Commission Should Clarify Several Aspects Of Its Proposal With Respect To Mobile Satellite Services.

1. "End Users" Of Commercial MSS Should Be Defined In Accordance With Section 332(d)(1) And Previous Commission Decisions.

In its Notice, the Commission tentatively concludes that a satellite system licensee who "opts to provide commercial mobile service directly to end users . . . shall be treated as a common carrier."[43/] The Commission also proposes that the "provision of commercial mobile service to end users by earth

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42/ See Section II.E.1, infra.

43/ Notice, FCC 93-454, slip op. at 16-17.

station licensees or providers who resell space segment capacity" be treated as common carrier service.[44/] The Commission, however, does not define the term "end users."

It is TRW's understanding that when the Commission uses the term "end user," it is referring to customers of commercial mobile service as defined in Section 332(d)(1), i.e., "the public" or "such classes of eligible users as to be effectively available to a substantial portion of the public." In this regard, TRW notes that although the term "end users" does not appear in Congress' recent amendments to the Act, or in the Explanatory Statement's discussion of those amendments, the Explanatory Statement nevertheless indicates that "[u]nder section 332(c)(1)(A) . . . the provision of space segment capacity directly to users of commercial mobile services shall be treated as common carriage."[45/]

As commercial mobile service is expressly defined in the Act in terms of the users of the service in Section 332(d)(1), the term "users of commercial mobile services" described in the Explanatory Statement can only be "the public" or "such classes of eligible users as to be effectively available to a substantial portion of the public" to whom for-profit,

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44/ Id. at 17.

45/ Explanatory Statement at 494 (emphasis added).

interconnected mobile service is made available. In other words, the term "end users" is most logically interpreted as synonymous with "the public" or "such classes of eligible users as to be effectively available to a substantial portion of the public." TRW requests any clarification that may be necessary to confirm this understanding.

2. Resellers Of MSS Space Segment Capacity Should Be Subject To Common Carrier Regulation Only If They Provide Service Directly To End Users.

In the Notice, the Commission proposes that "provision of commercial mobile service to end users by . . . providers who resell space segment capacity would be treated as common carrier service."[46/] In a footnote in the same paragraph, however, the Commission states that it "will not exempt resellers of [MSS] space segment capacity from the Act's common carriage requirement."[47/] These two statements are inconsistent and in need of clarification. Specifically, the second statement, unlike the first, does not account for the possibility that a reseller of MSS space segment capacity may not provide service directly to an end user, but instead may "serve" another reseller.

46/ Notice, FCC 93-454, slip op. at 17 (emphasis added).

47/ Id. at 17 & n.62.

TRW urges the Commission to confirm that only the resale of MSS space segment capacity directly to end users of commercial mobile services will be treated as common carriage under the new regulatory regime.[48/] Indeed, it seems reasonably clear at this point that the resale of MSS separate space segment capacity to parties other than "end users" should not be found to constitute common carriage.[49/]

3. Some MSS Provided Directly To "End Users" May Constitute Private Mobile Service.

TRW does not here take issue with the Commission's conclusion that the provision of "commercial mobile service" directly to end users, whether by MSS/RDSS systems, resellers, or other service providers, would constitute common carriage. Nevertheless, it asks the Commission to recognize that there may be instances where MSS may be provided directly to "end users,"

48/ In this regard, TRW notes that neither Section 332(c)(5) of the Act, nor the Explanatory Statement's discussion thereof (a citation to which precedes the second Commission statement) gives any indication of the appropriate regulation of resellers of MSS space segment capacity. The Explanatory Statement does state, however, that the provision of space segment capacity directly to users of commercial mobile services shall be treated as common carriage. Explanatory Statement at 494.

49/ Should a party resell MSS space segment capacity to a service provider or to another reseller, no service would be provided to "users of commercial mobile service" or "end users." Thus, no commercial mobile service would have yet been provided.

but still constitute a private mobile service. For example, the provision of satellite-based tracking services to truck fleets or to the nation's railroads may be offered on a non-interconnected basis, or a customer may desire to set up a private data services network for its employees that would not be intended for use by the public or even a "substantial portion" of the public. In either case, the service to "end users" would not satisfy one of the definitional components of the term "commercial mobile service."

In seeking to distinguish between "commercial mobile service" and "private mobile service" in its Notice, the Commission requests comment on whether it should draw a distinction between limited-eligibility services that are, as a practical matter, available to a substantial portion of the public, and such services that are offered to small or specialized user groups.[50/] Once again, the definition of a common carrier in NARUC I, upon which the Commission has consistently relied, provides the clearest answer. Where a service provider's practice is to make "individualized decisions, in particular cases, whether and on what terms to deal," it is not a common carrier. Where an MSS provider makes such decisions, whether its clients are service providers or end

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50/ Notice, FCC 93-454, slip op. at 9.

users, its service cannot be common carriage, and therefore cannot be considered commercial mobile service under Section 332(c)(1)(A). It therefore must be a private mobile service under Section 332(d)(3).

TRW urges the Commission to exercise its interpretive discretion under Section 332 of the Act and define "private mobile services" as broadly as possible. Its objective here would be to afford mobile satellite service providers with the maximum flexibility to develop service offerings tailored to users' needs -- an ability that would be jeopardized by overly intrusive commercial mobile services regulation.[51/]

4. The Commission Should Apply A Flexible Regulatory Scheme To Both PCS And MSS/RDSS.

TRW supports the Commission's tentative conclusion that no single regulatory classification should be applied to all terrestrial PCS services.[52/] TRW agrees with the Commission that Section 332 of the Act does not require the Commission to limit PCS to commercial mobile service applications. Rather, PCS could potentially offer a diverse array of mobile services, some

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51/ Id. TRW believes that it may be difficult for the Commission to develop objective criteria (see id.) that would be equitably applied to all mobile services. It should make commercial/private determinations on an ad hoc, service-by-service basis.

52/ Id. at 17.

of which might not be interconnected to the public switched network or might not be offered to a substantial portion of the public. By limiting the definition of PCS to commercial mobile service, the Commission could unnecessarily restrict the diversity of PCS applications. TRW requests that the Commission adopt the same flexible approach in classifying mobile satellite services such as MSS/RDSS, many of which may also not be interconnected with the public switched network or may not be offered to a substantial portion of the public.

TRW also supports the Commission's proposal to allow all PCS licensees to choose whether to provide commercial or private mobile service, as defined in Section 332, regardless of frequency assignment.[53/] Such a system would allow licensees to choose the type of services they will provide based on market demand, and not on regulatory preconditions. A choice-based system would not be without precedent, as the Commission has allowed licensees to select their regulatory status in other services.[54/] TRW requests that the Commission allow licensees that provide MSS/RDSS the same choice-based system so that they

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53/ Id. at 18.

54/ See Revisions to Part 21 of the Commission's Rules Regarding the Multipoint Distribution Service, 2 FCC Rcd 4251, 4252-53 (1987); Transponder Sales, 90 F.C.C.2d at 1255, 1257.

can remain responsive to market demand in the critical start-up phase of their operations.

III. THE COMMISSION SHOULD FORBEAR FROM TITLE II REGULATION OF ALL COMMERCIAL MOBILE SERVICES TO THE MAXIMUM EXTENT ALLOWED UNDER SECTION 332.

Under Section 332(c)(1)(A) of the Act, the Commission may decline to apply most of the provisions of Title II of the Act to any commercial mobile service, or to any person engaged in providing such service.[55/] Although Sections 201, 202, and 208 of the Act are withheld from the Commission's forbearance powers, the Commission may forbear from applying any other section in Title II if it makes the findings required by Section 332(c)(1)(A).[56/] As discussed in Section II above, TRW, as the operator of an MSS/RDSS system that would generally make space

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55/ 47 U.S.C. § 332(c)(1)(A).

56/ Id. Under Section 332(c)(1)(A), the Commission may specify any section of Title II other than sections 201, 202 or 208 as inapplicable to a commercial mobile service or a person engaged in the provision of that service, but only if the Commission determines that --

> (i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
> (ii) enforcement of such provision is not necessary for the protection of consumers; and
> (iii) specifying such provision is consistent with the public interest.

47 U.S.C. § 332(c)(1)(A).

segment capacity available to providers of commercial mobile services, is not likely itself to be a person engaged in the provision of commercial mobile service. Nevertheless, for the reasons discussed in this section, TRW urges the Commission to use the authority granted it in Section 332(c)(1)(A) to determine that Title II of the Act is inapplicable to commercial mobile services to the fullest extent permissible.

At the outset, TRW agrees with the Commission's tentative view that "the level of competition in the commercial mobile services marketplace is sufficient to permit [the Commission] to forbear from tariff regulation of the rates for commercial mobile services provided to end users."[57/] It appears that there will be multiple providers of MSS/RDSS capacity in the MSS/RDSS bands -- a condition that will operate to ensure that the rates charged to the "consumers" of satellite-delivered commercial mobile services will be non-discriminatory, and that will also encourage entry by competing service providers and flexible service arrangements. In addition to the certain intramodal competition that MSS/RDSS operators will face from each other, they will also face intermodal competition from other satellite-based technologies and multiple terrestrial mobile service providers. Thus, the

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57/ Notice, FCC 93-454, slip op. at 23 (footnote omitted).

Commission's view of the competitiveness of the marketplace for commercial mobile services is accurate; it also is especially on-target for the MSS/RDSS segment of that marketplace.

The Commission notes that it tentatively concluded in its Notice of Proposed Rulemaking and Tentative Decision regarding new PCS services that the "substantial competition" PCS providers would face both from other PCS services and from other radio services reduced the need "for government to protect customers from abuses stemming from market power."[58/] The same conditions that are true today with respect to PCS -- and that led the Commission to propose not to apply Sections 203, 204, 205, 211 and 214 of Title II to those PCS services that may be deemed to be commercial mobile services -- apply with at least equal vigor to the MSS/RDSS marketplace. Indeed, when the global nature of the MSS/RDSS marketplace is considered, the need to avoid hampering service providers with domestic regulatory burdens that could reduce their competitiveness overseas becomes even more pronounced.[59/]

58/ Id. at 23 (citing Amendment of the Commission's Rules to Establish New Personal Communications Services, 7 FCC Rcd 5676, 5712-14 (1992)).

59/ In this regard, TRW specifically endorses the Commission's tentative conclusion to forbear from rate regulation in the cellular services. See Notice, FCC 93-454, slip op. at 23-24. As envisioned by several of the MSS/RDSS system applicants -- including TRW -- the new satellite systems

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TRW also supports the Commission's tentative conclusion that it should forbear from adopting or enforcing regulations for any commercial mobile service provider based on sections 210, 212, 213, 215, 218, 219, 220 and 221.[60] These sections, which are generally designed to give the Commission sufficient oversight powers so as to be able to act to prevent abuses by carriers with the ability to act noncompetitively, are rendered unnecessary by the competitive conditions that will and do characterize the marketplace for commercial mobile services.[61]

The Commission has inquired whether it should impose "safeguard requirements" on commercial mobile service providers that are affiliated with dominant common carriers (in instances where it refrains from regulating the services provided by those affiliates).[62] To the extent that such safeguards have been imposed, it has been to ensure that the dominant-carrier affiliate does not act in an anticompetitive manner.[63]

59/ (...continued)
will be ideal for augmenting the limited coverage range of terrestrial cellular systems with satellite services on a basis that is transparent to the end user.

60/ Id. at 24-25 & 24 n.86.

61/ See, e.g., 47 U.S.C. § 218 (Commission empowered to inquire into management of carriers in order, inter alia, "to enable [it] to perform the duties and carry out the objects for which it was created").

62/ Notice, FCC 93-454, slip op. at 24.

63/ Id.

Again, based on the highly competitive nature of the commercial mobile services marketplace, TRW is of the view that prophylactic safeguard measures are not necessary. There will be no dominant carriers in the commercial mobile services marketplace for the foreseeable future. In any event, the Commission has noted that it retains the power -- even with forbearance -- to redress carrier abuses through its complaint process under Section 208 of the Act.[64/]

TRW requests that the Commission forbear in its application of sections 223, 225, 226, 227 and 228 to commercial mobile service providers generally, and to MSS/RDSS in particular.[65/] Although these sections contain several important protections for consumers, the Commission simply does not know at this point which of the provisions, if any, are necessary or appropriate for application to commercial mobile services providers. Thus, for now, TRW urges the Commission to forbear from applying these provisions. The Commission has the right, of course, to revisit the matter on a case-by-case basis should it develop that abuses are occurring or other important

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64/ Id. at 23 (citing 47 U.S.C. § 208).

65/ See id. at 25.

consumer protection objectives of these statutes are going unmet.[66/]

Finally, and irrespective of the foregoing, TRW urges the Commission to tread carefully and lightly in making decisions about Title II regulations that may be considered for application to the MSS/RDSS service. The costs, logistical challenges, and business and physical risks associated with the construction, launch, and operation of a multi-satellite constellation are tremendous. Application of Title II -- beyond those sections required by Congress to be applied -- could impose marginal burdens that, cumulatively, may jeopardize the health of this important new market. The public interest would be much better served by an MSS/RDSS service that has an opportunity to develop naturally than it would be by one that has to negotiate a regulatory minefield.

66/ TRW notes specifically, however, that because the MSS/RDSS service will be operated in part as a satellite-based supplement to terrestrial cellular services (and perhaps other commercial mobile services) there may be instances where consumers already receive some of the protections afforded in these sections of the Act. In such cases, there would be grounds for the Commission to forbear from applying these sections to whatever MSS/RDSS services may be deemed to be commercial mobile services, even if forbearance might not be appropriate for other such services.

IV. THE COMMISSION SHOULD PREEMPT STATE REGULATION OF THE RIGHT TO, TYPE OF, AND RATES FOR INTRASTATE INTERCONNECTION OF COMMERCIAL MOBILE SERVICES TO LOCAL EXCHANGE CARRIERS.

In Section 332(c)(3) of the Act, Congress preempted all state regulation of rates and entry requirements for all commercial and private mobile services in general. The Act, however, affords the states the right to regulate other terms and conditions of commercial mobile service.[67/] The Commission makes a number of proposals regarding state and local regulation of interconnection of commercial and private mobile services with LEC facilities. TRW provides its comments on these proposals, and on their implications for the MSS/RDSS service, below.

First of all, TRW supports the Commission's proposal to preempt state regulation of the right to intrastate interconnection with LECs, and of the type of interconnection.[68/] It agrees with the Commission that permitting state regulation of the right to interconnect and of the type of interconnection would negate the important federal purpose of ensuring interconnection to the interstate

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67/ Notice, FCC 93-454, slip op. at 1.

68/ See id. at 26.

network.[69/] In TRW's view, the facts that supported the Commission's determination that separate interconnection arrangements for interstate and intrastate services of cellular carriers is infeasible -- and which led the Commission to assert "plenary jurisdiction over the physical plant used in the interconnection of cellular carriers"[70/] -- mandate a similar conclusion of inseverability of interstate and intrastate interconnection by LECs in the commercial mobile services context.

Thus, TRW supports the Commission's proposal to ensure that PCS providers have a federally-protected right to interconnect with LEC facilities (regardless of whether they are classified as commercial or private mobile service providers), and that inconsistent state regulation should be preempted.[71/]

69/ See id. The Commission has held, and the courts concur, that it may regulate facilities used in both inter- and intra-state communications to the extent it proves "technically and practically difficult" to separate the two types of communications. American Telephone & Telegraph Co., 56 F.C.C.2d 14, 19, 20 (1975) ("AT&T") (cited in California v. FCC, 567 F.2d 84, 86 (D.C. Cir. 1977), cert. denied, 434 U.S. 1010 (1978)). The court in California v. FCC agreed with the Commission that "the opposite conclusion would leave a substantial portion of the interstate communication service unregulated," and "inconsistent state regulations could frustrate the congressional goal of developing a 'unified national communications service.'" California v. FCC, 567 F.2d at 86 (citing AT&T, 56 F.C.C.2d at 20).

70/ Notice, FCC 93-454, slip op. at 26 (citations omitted).

71/ Id. at 27.

TRW further urges the Commission to grant the same rights to providers of MSS/RDSS space segment capacity. Access to the end users who can only be reached through LEC facilities is essential to the ability of both PCS and MSS/RDSS to compete effectively in the mobile services marketplace.[72/]

TRW also supports preemption of state regulation of interconnection rates. For inherently national or international services such as those commercial mobile services to be provided over MSS/RDSS systems, requiring compliance with a patchwork of conflicting state regulations would inhibit the development of the market for such services, and would reduce the impact of the technical and economic effectiveness service providers could hope to attain.[73/]

72/ The Commission, however, should not require that MSS/RDSS system operators provide interconnection to the terrestrial mobile service providers. Until expected demand for the new services materializes, and the market has had a chance to develop, imposing a mandatory interconnection obligation on MSS/RDSS systems could inhibit the development of the market and deprive system operators of desirable flexibility.

73/ This is one area where the inherently interstate/ international nature of the MSS/RDSS service requires the Commission to treat the service differently from PCS services. See Notice, FCC 93-454, slip op. at 28 (Commission proposes not to preempt state/local rate regulation; reserves the right to do so later if development of interstate PCS is hindered by state/local regulation). The Commission has on previous occasions preempted state regulation on the grounds that satellite communications are inherently interstate in nature. See Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, 59 R.R.2d 1073, 1079-80 (1986) (preempting state and local zoning and other regulations regarding satellite

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Finally, even if the Commission determines that it should not preempt state regulation of the right of all mobile services to interconnect to LECs or of interconnection rates for such services, TRW requests that the Commission preempt such state regulation with respect to commercial mobile services that may be provided via MSS/RDSS systems. The MSS/RDSS service involves such great costs and complex logistical considerations, and is so primarily interstate and international in nature as to render any use for intrastate communications ancillary. Total federal preemption is therefore warranted.

V. CONCLUSION

On the basis of the foregoing discussion, TRW urges the Commission to exercise the discretion afforded it by Congress, and continue to use its existing procedures to authorize mobile satellite service licensees to offer system capacity for sale or

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73/ (...continued)
receive-only and transmitting antennas on the grounds, inter alia, that satellite-delivered signals are "unquestionably interstate in nature"); Earth Satellite Communications, Inc., 95 F.C.C.2d 1223, 1231 (1983) (preempting State of New Jersey's jurisdiction over Satellite Master Antenna Television ("SMATV") systems on the grounds, inter alia, that "[t]he program signals transmitted and the communications satellites that provide these signals to the receive station of an SMATV system are inherently interstate in nature and subject to federal regulation and preemption."), aff'd sub nom. New York State Comm'n on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984).

lease on a non-common carrier basis. Only satellite operators who provide service directly to the public at large should be subject to commercial mobile services regulation. Moreover, TRW urges the Commission to forbear from applying Title II regulation to the MSS/RDSS service to the maximum extent permitted under Section 332 of the Act. TRW also calls upon the Commission to preempt state regulation of the right to and type of intrastate interconnection with LECs, and of interconnection rates established by LECs for providers of MSS/RDSS.

Respectfully submitted,

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